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No. 80-2131

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
a corporation,
Appellant,

VS.

THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA,
Appellee,

CITY OF SALINAS,
Real Party in Interest.

On Appeal From the Supreme Court of the State of California

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM FILED BY APPELLEE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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Appellant, Southern Pacific Transportation Company, files this brief in opposition to the Motion to Dismiss or Affirm of the Appellee (sometimes hereinafter refrred to as "the Commission"), dated July 16, 1981.

I

THE COMMISSION HAS ATTEMPTED TO AVOID THE PRINCIPAL ISSUE BY MAKING GENERALIZED STATEMENTS AND MISREPRESENTING THE CONTENTS OF PLEADINGS FILED WITH THE COMMISSION BY APPELLANT

The Commission does not dispute the fact that the California Supreme Court, in *City of Oakland v. Schenck,* 197 Cal. 456, 460 (1925), has unequivocally held that the railroad's right of way is private property and can only be taken pursuant to a statute conferring the power of eminent domain and making provision for reasonably compensating the owner. The Commission has been given eminent domain powers, including the power to award compensation and issue final orders of condemnation in a case of this type, by Sections 1206-1208 of the California Public Utilities Code. The problem herein is that the Commission was not requested to exercise those powers by the City of Salinas, it has not exercised those powers in the manner specifically prescribed by these unambiguous sections of the Public Utilities Code and, moreover, it has issued its order retroactively taking appellant's property by amending and modifying a previous order without complying with Sections 1708 and 1736 of the California Public Utilities Code which specify when and how the Commission is permitted to amend its orders. Instead of directly addressing itself to what has actually occurred, the Commission's motion attempts to side-step the problem with generalized statements that are often irrelevant and, in at least one case, misrepresent what is contained in the pleadings of record.

A. The Fact That Interpretation and Operation of State Statutes Is the Responsibility of the Commission and the California Courts In the First Instance, Is Irrelevant

The Commission first asserts that interpretation and operation of state statutes is the exclusive responsibility of the Commission and the California courts (Cal. Motion, p. 2).[1] Appellant does not contest this assertion. However, it is irrelevant.

The fact that the Commission and the California courts may, in the first instance, have the responsibility for interpretation and operation of state statutes does not establish that the statutes, either by their own wording or as interpreted and applied by either the Commission or the California courts, meet the basic requirements of Federal due process. Nor does it establish that either the Commission or the courts have acted in accordance with such due process requirements. In this regard, it is particularly important to note that even in its Decision No. 92299 (Jurisdictional Statement, Appendix E), in which the Commission attempted to bolster its earlier decision by adding various conclusions of law, it assiduously *avoided* any discussion or reference to Sections 1206-1208, 1708 and 1731 of the California Public Utilities Code, which specify the manner in which the Commission can exercise condemnation powers and modify its orders, which were the principle statutory provisions relied upon in the application for rehearing. Thus, how the Commission can assert that it has somehow interpreted the California statutes which provide the principal basis for this appeal, is incomprehensible. What it did was *ignore* them, just as it has also done in its motion to dismiss herein, and that is the principal

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[1]References to the Motion to Affirm or Dismiss filed by the California Public Utilities Commission of the State of California herein, shall be abbreviated as "Cal. Motion", followed by a page citation.

reason why this appeal has been filed. Moreover, as pointed out in Section II herein (*infra.* p. 5), the Commission's attempt to construe the California Supreme Court's denial of review and rehearing as an interpretation of the statutes involved herein, is directly contrary to the California Supreme Court's most recent pronouncement concerning the meaning to be ascribed to a denial of review of a Commission decision.

B. The Commission Has Misrepresented the Contents of Formal Pleadings Filed with the Commission by the Appellant

At page 4 of its motion, the Commission apparently acknowledges that it entered its retroactive order, modifying a previous decision by adding a new order granting the City an interest in the real property of appellant, without an opportunity to be heard or present evidence. However, it attempts to neutralize that damaging fact by asserting that the appellant filed both a petition for rehearing and a reply to a subsequent brief by the City in which it raised issues that were "purely legal" and "never alleged that the convention of a hearing was necessary for the taking of additional factual evidence". This is a misrepresentation of what was set forth in the pleadings cited.[2]

In the reply filed on July 25, 1980, for example, the following statement appears on page 3:

> "In the Application for Rehearing filed herein on July 1, 1980, respondent pointed out that only because of the Commission's retroactive modification did Cal-

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[2]The petition for rehearing of July 1, 1980 and appellant's reply to the subsequent brief of Salinas on July 25, 1980 are reproduced in their entirety in the appendix to the petition for writ of review filed with the California Supreme Court and, as a result, will be included in any record certified to this Court for purposes of this appeal.

> Trans reverse its position and make an allocation to the City of Salinas. Moreover, if rehearing is granted, *it has offered to produce evidence,* by way of certified pleadings and affidavits of the City, that this project most likely would never have been built in the absence of a reversal of CalTrans position which occurred solely as a result of the alleged 'minor' modification . . ." (Emphasis added)

Therefore, while the complete failure of the Commission to provide an opportunity to be heard and present evidence, as specifically required by California statute, would seem to be more than enough, in itself, to establish a denial of federal due process, the Commission's assertion that the appellant never alleged in its formal pleadings to the Commission that a hearing was necessary for the taking of additional factual evidence, is patently erroneous and is a misrepresentation of the contents of the pleadings cited.

II

THE COMMISSION HAS IGNORED THE RECENT AND EXPLICIT STATEMENTS OF THE CALIFORNIA SUPREME COURT IN THE CONSUMERS LOBBY CASE

At page 2 of its motion, the Commission asserts that the denial of review and rehearing by the California Supreme Court "fully affirms" the actions of the Commission under state law and cites *People v. Western Airlines, Inc.,* 42 Cal. 2d 621, 630-631 (1954). On page 5 of its motion it pursues this idea further by asserting that denial of review by the California Supreme Court, "inasmuch as none of the procedural defects discussed the *Consumers Lobby* opinion" are present in the instant case, is a "clear message" from the California Supreme Court that the petition for writ of review failed to set forth sufficient grounds for

the granting of review. These assertions are in direct contradiction to what the California Supreme Court actually stated in *Consumers Lobby Against Monopolies v. Public Utilities Commission*, 25 Cal. 3d 891 (1979).

In the *Consumers Lobby* case, the California Supreme Court substantially clarified (or changed, depending upon one's point of view) its earlier decision in *People v. Western Airlines, Inc.*, 42 Cal. 2d 621 (1954), appeal dismissed 348 U.S. 859. In the *Consumers Lobby* case the California Supreme Court has made it abundantly clear that the assertions of the Commission in its motion concerning the meaning or effect to be given to the California Supreme Court's denial of review are unjustified. As the California Supreme Court stated in the *Consumers Lobby* case (p. 905; see also, Appendix to Jurisdictional Statement, p. I-9), a summary denial of review does not set forth any reason why the review has been denied and, according to the California Supreme Court, it would "therefore be sheer speculation for litigants to rely on such decisions as precedent." If that is the case, then it is also "sheer speculation" for the Commission to assert that denial of review of this case represents a "clear message" that the Commission's orders "were in compliance with apposite state statutes and regulatory law." (Cal. Motion, p. 5). If that were true, it must be obvious that the Commission would be entitled to treat the action of the California Supreme Court as a precedent in future cases. In other words, the California Supreme Court's denial without opinion would be treated as stare decisis, which is diametrically opposed to what the California Supreme Court actually held in the *Consumers Lobby* case.

The Commission also asserts that the California Supreme Court's decision in *Consumers Lobby* did not significantly alter the nature of the review process with respect

to decisions of the California Public Utilities Commission (Cal. Motion, p. 7). It is submitted that this assertion of the Commission simply will not stand up under scrutiny. A simple reading of the decision in the *Consumers Lobby* case will demonstrate that it is inconsistent with any contention that a denial of review represents a holding that the Commission correctly interpreted state statutes or did not exceed its statutory authority. In fact, that very contention was made by the Commission in the *Consumers Lobby* case (p. 899). However, the contention was rejected and the California Supreme Court went out of its way to warn that it would be "sheer speculation" for litigants to try to determine what the reasoning of the California court was when it has denied review (p. 905).

CONCLUSION

The motion of the Commission fails to provide any reasonable basis for dismissal of the appeal. The fact remains that the Commission, without complying in any way with specific California statutes on the subject, has retroactively entered an order, modifying a previous decision, which condemns an interest in the real property of the appellant without compensation, hearing or an opportunity to present evidence, and the California Supreme Court, without explanation, has refused to review that decision. The Commission attempts to divert attention from its blatant disregard of specific statutory requirements, as well as its disregard of procedural and substantive due process requirements, by taking the position that it must be assumed from the fact that the California Supreme Court denied review that the Commission's action was in accord with both state law and the basic due process requirements of the United States Constitution, despite the fact that the California Supreme Court did not have the record before it since it denied review and has specifically said that any such assumption would be improper since it would constitute "sheer speculation".

If the motion of the California Commission establishes anything at all, it is that perhaps this Court, instead of according plenary consideration to the matter, should act summarily by issuing an order stating that the action of the Commission herein clearly raises a substantial question as to whether the Commission's action denied appellant both substantive and procedural due process required by the Fourteenth Amendment of the Constitution of the United States, so that there is no doubt that review should have been granted by the California Supreme Court, and direct that the order of the California Supreme Court denying review be reversed as being in conflict with previous decisions of this Court which provide that availability of an adequate opportunity for review of administrative decisions is an essential requirement of due process required by the Fourteenth Amendment of the Constitution of the United States (see Jurisdictional Statement, p. 30). It is submitted that, in any event, the Motion to Dismiss or Affirm does not set forth any legal basis for granting the motion and Appellant respectfully submits that the motion should be denied.

Dated: July 31, 1981.
San Francisco, California.

Respectfully submitted,
HAROLD S. LENTZ
Attorney for Appellant